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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNON LEE GRAHAM, JR.,

Defendant and Appellant.

F072371

(Super. Ct. No. F14908297)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell III, Judge.

Carolyn D. Phillips for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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Vernon Lee Graham, Jr., pled no contest to causing injury while driving under the influence of alcohol, admitted he personally inflicted great bodily injury on Matthew

*Before Levy, Acting P.J., Franson, J. and Peña, J.

Crow, admitted his blood-alcohol content was above 0.15 percent at the time of the accident, and admitted he had a prior conviction for driving under the influence of alcohol. As a result of the plea agreement, additional charges and enhancements were struck. Although Graham was eligible for probation, the trial court denied probation and sentenced Graham to five years in prison.

Graham argues the trial court abused its discretion when it denied probation. We conclude the trial court acted well within the bounds of its discretion and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The complaint charged Graham with violation of Vehicle Code section 23153, subdivision (b), causing injury while driving with a blood-alcohol content above 0.08 percent. This count also alleged as enhancements that Graham had a blood-alcohol content of 0.15 percent or higher within the meaning of Vehicle Code section 23578, Graham caused bodily injury to more than one victim within the meaning of Vehicle Code section 23558, and that Graham personally inflicted great bodily injury upon Ernest Moreno, Jr., and Crow within the meaning of Penal Code section 12022.7, subdivision (a). Finally, this count alleged Graham suffered a prior conviction for violating Vehicle Code section 23152, subdivision (b) within the meaning of Vehicle Code section 23560.

Count 2 charged Graham with causing injury while driving under the influence of alcohol within the meaning of Vehicle Code section 23153, subdivision (a). This count alleged the same enhancements as in the first count.

The following summary of the events leading to these charges is taken from Graham's sentencing memorandum. After finishing his workday on the day in question, Graham, his employer, and Graham's cousin, Moreno, decided to go the employer's house to drink beer and play pool. According to the memorandum, Graham intended to spend the night at the employer's home, thus avoiding the need to drive home after drinking.

During the evening, Graham received a phone call from his eldest child saying Graham's wife Melissa had been injured when a bottle exploded while Melissa was putting a container in the garbage. Glass debris struck Melissa in her face and neck causing cuts. Melissa was on her way to the hospital to seek treatment for her injuries.

Graham felt the need to be with his wife, and apparently ignoring viable options such as calling a taxi or having a sober friend drive, he got into his vehicle with Moreno and began driving to the hospital. Graham asserted his recollection of the events that occurred during the drive were poor. As outlined below, Graham drove erratically and failed to stop at a red light, which caused a collision with the vehicle driven by Crow who was making a legal left turn. Crow, Moreno, and Graham were all seriously injured as a result of the collision. Graham recalled being extricated from his vehicle and telling emergency personnel he had to get to the hospital to be with his wife. A blood sample revealed Graham had a blood-alcohol content of 0.17 percent.

Graham reached a plea agreement as outlined above. In exchange, the other counts and enhancements were dismissed, and the maximum sentence Graham faced was six years in prison. Graham retained the right to seek probation as the appropriate sentence.

The issue in this appeal relates to the trial court's decision to deny Graham's request to be placed on probation. Accordingly, we will thoroughly summarize the information before the trial court at the sentencing hearing. We begin with Graham's sentencing memorandum. The memorandum indicated Graham grew up in a dysfunctional family and began drinking alcohol at a young age. He was married to Melissa and the two were raising five children. Graham had been continuously employed and provided half the support for the family.

Graham admitted his prior convictions, but stressed his efforts at rehabilitation since the accident. He enrolled in Touchstone Recovery Center's intensive outpatient program upon his release on bail. The program lasted eight weeks and was followed by a

year of aftercare. Graham also began attending at least two Alcoholics Anonymous meetings a week. In total, Graham attended and/or participated in 182 meetings or therapy sessions in the approximately one year after the accident.

When released on bail, Graham also obtained a SCRAM device, which would notify authorities if he consumed alcohol. There is no evidence he consumed any alcohol after his release. Graham stressed his remorse for his actions and that he had apologized to the victim and the victim's family.

The probation report noted Graham's family status as outlined above, as well as his participation in the Touchstone Recovery Center program. It also noted Graham received a general discharge from the Navy related to alcohol issues. He reported no controlled substance abuse other than alcohol. The report indicated Graham drank 18 beers a day for the five years preceding the accident.

The summary of the accident included a witness statement. The witness was traveling eastbound on Herndon when she heard a loud exhaust system. She observed headlights approaching behind her vehicle at a high rate of speed. The vehicle, driven by Graham, made a sudden lane change to pass the witness, but then cut back in front of her just as suddenly. The witness had to brake to avoid a collision.

The witness observed that ahead on Herndon the light was red and a vehicle was stopped at the light in the same lane as occupied by Graham. Once again, Graham abruptly changed lanes and passed the stopped vehicle, thereby running the red light. Graham's vehicle then collided with the vehicle driven by Crow.

Graham's criminal history began with a conviction for misdemeanor unlawful intercourse with a minor in 1998. (Pen. Code, § 261.5, subd. (b).) In 2001, he was convicted of driving with a suspended or revoked license. (Veh. Code, § 14601.1, subd. (a).) In 2002, he was convicted of inflicting corporal injury on a spouse. (Pen. Code, § 273.5, subd. (a).) In 2003, he was convicted of reckless driving and was ordered to participate in a driving while intoxicated, first offender program. (Veh. Code, § 23103,

subd. (a)/23103.5.) In 2004 and 2005, he was convicted three times of driving with a suspended or revoked license. (Veh. Code, § 14601.1, subd. (a).) In 2007, he was convicted of driving while intoxicated as a second offense, as well as driving with a suspended license on two separate occasions. (Veh. Code, §§ 23152, subd. (b), 23540, and 14601.1, subd. (a).) He was ordered to participate in an 18-month multiple offender, driving under the influence program.

The report noted one factor in aggravation, that being Graham's numerous adult convictions. Similarly, one factor in mitigation was noted, that being that Graham voluntarily acknowledged wrongdoing at an early stage of the proceedings. If a prison term was imposed, the report recommended a mitigated term of 16 months, plus three years for the Penal Code section 12022.7, subdivision (a) enhancement.

However, the probation officer recommended that Graham be placed on probation because Graham (1) did not have any prior felony convictions, (2) had two prior driving under the influence convictions, (3) had six misdemeanor convictions for driving on a suspended license, although he had a valid driver's license at the time of the collision, (4) completed an outpatient treatment program, (5) participated in Alcoholics Anonymous meetings, (6) and was successfully wearing an alcohol monitoring device. The probation officer concluded Graham's actions since the accident, as well as his early plea, justified probation in this case.

The probation report included a letter from victim Matthew Crow and the victim's advocate. Crow explained he was driving home from work when the accident occurred. Crow was making a left turn with a green light when Graham drove around vehicles that had stopped for the red light. Crow did not see Graham's vehicle before the collision. Crow's vehicle was totaled, and Crow suffered numerous injuries, including a broken ankle. The accident occurred during the first week of Crow's freshman year at Fresno State. He had to drop a class because of the physical and psychological injuries suffered in the accident. He also was off work for a period of 21 weeks. Crow could not drive

and became dependent on others for transportation. He obtained counseling to help deal with the psychological injuries he suffered. Crow, an avid runner, lost the possibility of trying out for the Fresno State cross-county team. The trauma to his ankle will likely cause him to have arthritis in the future. Total medical expenses incurred were over \$20,000.

The probation report also included a status report from the SCRAM alcohol monitoring device obtained by Graham. This report stated Graham had complied with all the requirements of the program.

Attached to the report was a letter from Graham. Graham related his family status and admitted his numerous violations for driving with a suspended license. He was married in 2005, and admitted his driving while intoxicated conviction in 2007, as well as a domestic violence charge in 2011 that was eventually dropped. He attributed these events to his heavy drinking, but asserted he did not think he had a drinking problem.

He then repeated the sequence of events leading up to the accident. Since the accident, Graham realized the poor choices he had made throughout his life and outlined the steps he had taken to improve his choices. He asserted he was doing everything possible to change his life and asserted that if sentenced to prison, there would be a negative impact on his family. He promised he would never drink alcohol again and would continue with his support groups. He apologized for the harm he caused and asked the Crow family for forgiveness.

A report from the Touchstone Recovery Center concluded Graham had successfully completed the program and was actively involved in a support group. The report concluded Graham's prognosis for continued abstinence was good. SCRAM status reports were also included, which revealed no alcohol consumption and no tampering events during the reporting period. Letters of support for Graham were provided by his wife, mother, employer, and an acquaintance. Each noted the positive changes Graham

had made in his life after the accident, as well as providing other information about Graham. Finally, various pictures related to the accident were included in the report.

At the sentencing hearing the trial court began by stating it had reviewed the probation reports and the items attached thereto. Some minor corrections were made to the report. Several individuals then spoke regarding sentencing.

The first was David Crow, Matthew's father. He eloquently explained the devastating effect the collision had on Matthew and the family and how lucky the family felt that Matthew had survived the horrific event. He also emphasized the importance of distance running to Matthew, and how the accident will deprive him of that in the future. He pleaded with the court for a prison sentence appropriate to the severity of the crime committed, expressing shock that the probation department recommended placing Graham on probation.

Teryn Cook, the fiancée of Matthew's older brother, spoke next. She, too, focused on Matthew's survival but mourned the loss of his long-distance running future. She also requested that Graham be sent to prison for a time appropriate to his crime.

Matthew spoke briefly to the court, explaining the physical and psychological damage caused by the accident, and requested that justice be done in court that day.

Several individuals spoke on behalf of Graham. Steve Perez was Graham's sponsor. He explained that Graham has done everything asked of him since entering the program and had performed well.

Doug Davidian met Graham and his wife at a church group designed to apply biblical principles to change one's life. He explained that through this group he had seen Graham transform his life and had seen the change in his marriage. He expressed his belief that Graham did not belong in prison.

Max Plowman had known Graham for approximately 15 years. He described his relationship with Graham as two brothers. He also had observed the change in Graham since the accident and the improvement in his life and his marriage.

Melissa Graham confirmed the events of that night and how grateful she was that everyone survived. But she did not feel that sending Graham to prison would rehabilitate him anymore than what he had already accomplished. She also explained the tremendous impact that would be felt in the family if Graham was imprisoned. She asked the trial court to consider the circumstances that led up to the accident as well as the results of that accident.

Graham also spoke on his behalf. He apologized to Matthew and his family for his actions, took responsibility for his poor choices, and placed himself at the mercy of the court.

The prosecutor vehemently disagreed with the probation officer's report and argued the seriousness of the injuries, as well as Graham's blatant disregard for the safety of other motorists, demanded that Graham be sentenced to prison. Defense counsel argued probation was appropriate because Graham did not intend to drive that night but did so only because of the emergency that occurred with his wife, and he stressed Graham's rehabilitation efforts since the accident. He asked the trial court to give Graham a second chance by placing him on probation.

The trial court took the lunch break to consider the appropriate sentence to be imposed. It then explained its reasoning and sentenced Graham as follows.

“THE COURT: ... First thing, I want to thank everyone for being patient with the Court.· I know everybody's been here since 8:30, and unfortunately, I have to handle my calendar and have this at the same time.· This kind of situation is entitled to the time necessary to hear everything about this case, so I understand [defendant]'s background, exactly what happened in this case, the position of the victim and his family and take into consideration all aspects regarding this matter.· So, I apologize for that, and I also want to thank you for your professionalism in addressing the Court.· This is a very emotional type of case, and the Court greatly appreciates that.· That having been said, this is obviously not an easy case in so much as [defendant] is statutorily eligible for probation without limitation, but this is a case that is extremely serious and had some very serious implications and caused some very serious injuries to various

individuals, both physically and psychologically, and the Court does not take that lightly.

“Starting with [defendant], [defendant], I’m going to commend you as to your efforts to rectify your situation that you’ve taken subsequent to this.· It is worthy to note everything that you’ve done, and the Court does not take that lightly.· It appears that you are taking this extremely serious, and you really ought to thank [defense counsel] for coordinating the efforts to present your side of this horrible case.· At the end of the day, though, however, the Court cannot ignore the total unnecessary, senseless completely—completely avoidable situation that you created.· *This is not an accident.*· It did not have to happen, and the Court is satisfied that probation is not appropriate in this case on a number of levels.· First of all, when the Court looks at the resulting damages to individuals, there was not only Mr. Crow that was injured. You were injured, sir, you broke your arm.· There was another individual that was in the car—strike that, the truck, and that was—I’m trying to get Ernesto’s last name here.

“[DEFENSE COUNSEL]: Moreno, your Honor.

“THE COURT: Ernesto Moreno, your friend.· He had a lacerated liver; is that correct?

“THE DEFENDANT: Yes, your Honor.

“THE COURT: A lacerated liver.· Then we have Mr. Crow with a broken ankle, contusions and abrasions on his left knee, across his chest and waist, and I can’t even imagine the psychological stress that he experienced that night and will continue for an extended period of time, maybe the rest of his life.· And sir, I know you didn’t intend to go out and cause this, but it’s a direct consequence of the decisions that you made.· The Court’s very much aware of the surrounding circumstances of your wife’s pending medical situation and how anyone would believe that that’s an emergency they need to get to, but that is not an excuse in this case for you to drive the way you did.· I couldn’t imagine even being the nurse who is traveling eastbound on Herndon to hear a car revving at such velocity that they can hear it coming up behind them, and I’ve been in that situation in terms of just being a regular pedestrian—not pedestrian but a driver and hearing somebody coming up behind you.· That’s a very scary experience, because you don’t know if you move out of their way to get into the next lane, they’re going to not anticipate that and end up striking you. And ultimately, what could have happened, happened. Fortunately, you, Mr. Moreno and Mr. Crow were not injured more than you were, but again, this did not have to happen.

“With respect to the sentencing triad, the Court is satisfied that the mitigating circumstances in this case and the aggravating circumstances in this case equal each other out, and the Court is going to select the middle term of two years for those reasons. The Court, at this time, is going to deny probation for violation of Vehicle Code Section 23153 subdivision small (b), will select the middle term of two years as the base term. That will be enhanced pursuant to the three-year enhancement under Penal Code Section 12022.7, and you’ll be committed to the California Department of Corrections and Rehabilitation for that term.” (Italics added.)

DISCUSSION

Graham’s only argument is that the trial court abused its discretion when it sentenced him to prison instead of placing him on probation. As we shall explain, there is no merit to this argument. The trial court weighed all of the information before it and thoughtfully explained its decision to sentence Graham to prison. In doing so, the trial court acted well within the bounds of reason. Indeed, it is beyond the pale to suggest the trial court acted in an arbitrary, capricious, or irrational manner.

We review a trial court’s decision to grant or deny probation under the deferential abuse of discretion standard. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) “To establish abuse, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason.” (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) “In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]” (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896, impliedly overruled on other grounds in *People v. Calderon* (1994) 9 Cal.4th 69, 74-79.)

Graham relies on the probation officer’s recommendation as well as a distortion of the record to support his argument. In doing so, he ignores the factors which amply support the trial court’s denial of probation.

We begin with that which should be obvious. The trial court was not required to adopt the probation officer’s recommendation. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) The recommendation is advisory only, provided to aid the trial

court in determining an appropriate disposition. (*People v. Delson* (1984) 161 Cal.App.3d 56, 63.) Therefore, we reject Graham's argument to the extent he asserts the trial court erred because it failed to follow the probation department's recommendation.

We also reject as a distortion of the record Graham's claim the trial court found the collision was not an accident. Graham takes one comment by the trial court out of context. We have italicized this comment in the trial court's statements at the sentencing hearing on which Graham relies. Read fairly, the trial court's comment refers to the fact Graham chose to drive while he was intoxicated, chose to drive in a dangerous manner, and chose to drive through a red light, causing the collision. Graham's choices were not an accident, and, as the trial court noted, the collision was entirely avoidable. Undoubtedly, Graham did not intend to cause a collision, but the choices he made render the outcome almost inevitable.

Stripped of hyperbole, Graham's argument is the same as he made in the trial court. Graham was truly sorry for his actions and took numerous positive steps to address his alcohol problem. Graham is to be commended for his efforts, but is not entitled to be placed on probation because he made the efforts.

More importantly, Graham's argument was properly made to the trial court, not this court. The trial court had the discretion to impose either a prison sentence or probation, and defense counsel made as good an argument as possible under the circumstances. However, this court is limited to reviewing the record to determine if the trial court abused its discretion. And, as stated above, the trial court acted well within the bounds of its discretion.

We reiterate, the trial court reviewed all of the information before it, gave serious consideration to the request for probation, and weighed the circumstances in favor of probation and those opposed to probation. The trial court concluded the totality of the circumstances required a prison sentence. California Rules of Court, rule 4.414 provides guidelines to the trial court when deciding whether to grant or deny probation and was

applied where applicable. The trial court noted the nature, seriousness, and circumstances of the crime (*id.*, rule 4.414(a)(1)), the vulnerability of Crow (*id.*, rule 4.414(a)(3)), the physical and emotional injuries caused by Graham (*id.*, rule 4.414(a)(4)), the monetary loss suffered by Crow (*id.*, rule 4.414(a)(5)), Graham's active role in causing the injuries to Crow, Moreno, and himself (*id.*, rule 4.414(a)(6)), Graham's prior record of criminal conduct (*id.*, rule 4.414(b)(1)), Graham's willingness to comply with the terms of probation (*id.*, rule 4.414(b)(3)), Graham's apparent ability to comply with the terms of probation (*id.*, rule 4.414(b)(4)), the likely effect of Graham's imprisonment on his family (*id.*, rule 4.414(b)(5)), Graham's remorsefulness (*id.*, rule 4.414(b)(7)), and the likelihood Graham will be a danger to others if placed on probation (*id.*, rule 4.414(b)(8)).

It is readily apparent that some of these factors favor a prison sentence while others favor a term of probation. Objectively, it is also readily apparent the factors do not substantially predominate on either side of the analysis. Under such circumstances, it is the trial court that is vested with discretion to determine the appropriate sentence to be imposed. The trial court exercised that discretion in an unbiased manner that is not reasonably open to criticism.

DISPOSITION

The judgment is affirmed.